IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JULIE SCOTT and KATHY SWEET,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 04-2336-CM**
	)	
COMBINED INSURANCE COMPANY OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

Plaintiffs Julie Scott and Kathy Sweet bring this gender discrimination lawsuit pursuant to Title VII, 42 U.S.C. §§ 2000e *et seq.*, and the Kansas Act Against Discrimination ("KAAD"), Kan. Stat. Ann. §§ 44-1101 *et seq*. They allege that defendant, their former employer, subjected them to a hostile work environment and disparate treatment. They also claim that defendant demoted them in retaliation for reporting the harassing and discriminating actions. The case is before the court on defendant's Motion for Summary Judgment (Doc. 59). For the following reasons, the court grants defendant's motion in part and denies it in part.

I. PROCEDURAL BACKGROUND

Defendant's summary judgment motion proposes 92 uncontroverted facts for the court to consider. Plaintiffs' original response included an additional 502 facts spanning 87 pages. On defendant's motion, the court struck plaintiffs' additional uncontroverted facts, and granted plaintiffs leave to resubmit proposed additional material uncontroverted facts in the proper format within eleven days. Plaintiffs filed a revised

response to defendant's summary judgment motion, reducing the number of additional proposed facts to 267 facts spanning 38 pages. Defendant again moved to strike plaintiffs' revised response, but the court denied defendant's second motion to strike. The court noted that "plaintiffs have made a good-faith attempt to comply with the directive of the court and D. Kan. R. 56.1."

Plaintiffs' "good-faith attempt," however, was unsuccessful in many instances. The court has scrutinized plaintiffs' proposed facts and reviewed the record in great detail. Repeatedly, plaintiffs failed to provide a **concise** statement of facts. And plaintiffs' idea of what facts are **material** to this case differs greatly from the court's. In the statement of facts that follows, the court will not note each time that it has disregarded facts proposed by plaintiffs (or defendant, for that matter) or the reasons for doing so. The parties are assured, however, that the court has thoroughly reviewed the record, and has chosen to recite only the facts below that are uncontroverted, material, relevant, admissible, and properly supported by the record.

II. FACTUAL BACKGROUND[1]

A. Plaintiff Scott's Employment

Plaintiff Scott was employed by defendant from August 1996 until she resigned in December 2004. She began her employment as a licensed agent in defendant's 7th Essential ("7E") Division. As an agent, plaintiff Scott upgraded existing policyholders' coverage and sold new insurance policies.

Defendant promoted plaintiff Scott to sales manager ("SM") in January 1999. Plaintiff Scott's duties as an SM consisted of checking in licensed agents, checking their production, taking weekly

[1] The court construes the facts in the light most favorable to plaintiffs as the non-moving parties pursuant to Fed. R. Civ. P. 56.

objectives from them, and selling policies. Plaintiff Scott derived income from policies that she renewed and sold, and received "override" income from sales that both she herself made and sales that agents reporting to her made.

In December 1999, Jim Jensen, plaintiff Scott's supervisor at the time, promoted plaintiff Scott to the position of district manager ("DM"). Plaintiff Scott's new duties as a DM included running a team of agents and SMs. Plaintiff Scott was employed in that capacity until she was demoted to a licensed agent on October 15, 2003. In February or March 2004, plaintiff Scott transferred to defendant's Life/Health Division as a DM, where she worked until her resignation.

B. Plaintiff Sweet's Employment

Defendant employed plaintiff Sweet from February 1997 until she resigned in August 2004. She began her employment as a licensed agent and was promoted to SM in August 1998. She eventually reported to plaintiff Scott. Plaintiff Sweet served as an SM until she was demoted to licensed agent on October 15, 2003. In February or March 2004, plaintiff Sweet transferred to defendant's Life/Health Division as an SM, where she worked until her resignation.

C. Richard Hancock's and Anthony Cataffo's Transfers to the Kansas/Nebraska Region

Anthony Cataffo, a long-time employee of defendant, became the regional manager ("RM") for the Kansas/Nebraska region in late 2001, early 2002. During that time, Richard Hancock, also a long-time employee, served as the sub-regional manager in that region. Plaintiffs reported to Mr. Cataffo and Mr. Hancock.

D. Policy Violations Leading Up To Plaintiffs' Demotions

In April 2003, the divisional administrator, Mary Milan, sent a memo to plaintiff Scott regarding

"Production Package Inspection" to address plaintiff Scott's low "persistency rate" – 57% – when the objective was to have a 75% rate. The term "persistency rate" as used by defendant means how long a piece of business stays on the books before it is cancelled.

In her memo, Ms. Milan instructed plaintiff Scott to begin sending her production packages to the divisional office in Portland for added inspection, an instruction that plaintiff Scott complied with "sometimes." Plaintiff Scott's packages did not always arrive on time and did not always contain the supporting documentation that was required. Other DMs, including Jack Gardner, Craig Gumescheimer, and possibly Steve Melnick, also had late packages.

Plaintiff Scott also missed some conference calls – at least twenty-five percent of the calls in 2003. And she missed DM meetings that were held throughout the year. Plaintiff Scott believes that only Mr. Gumescheimer missed more DM meetings than she did, and Michael Hallbauer estimates that Mr. Milnek missed more calls than plaintiff Scott did.

Plaintiff Scott also overcalled income – or reported income that she had not yet earned – knowing it was a violation of company policy to do so. Plaintiff Scott maintains that she did it on occasions when Mr. Cataffo or Mr. Hancock instructed her to. On at least one occasion, Mr. Cataffo asked Mr. Gumescheimer to "make up" 130 units he was short; Mr. Cataffo had reported that his team had sold one thousand units, when in reality they had sold only 870.

Plaintiff Scott also had frequent "variances," which occurred when an agent's check total amount did not add up to the amount of policies sold or renewed, usually as a result of forgetting a check or undercharging or overcharging someone. Sometimes plaintiff Scott would note the variance; sometimes she would not. Mr. Gumescheimer also had negative variances for at least three weeks, including a substantial

negative variance of $1,130.46 for the weeks of June 9, 2003 and June 16, 2003.

In July 2003, Mr. Cataffo sent a note to plaintiff Sweet, pointing out that her cancellation rate of 28.6% was the highest in the Western Division of the United States, which was unacceptable.

E. Plaintiffs' Demotion

Going into the fourth quarter of 2003, the management team in the Kansas/Nebraska region was in the process of interviewing each DM. Mr. Cataffo had concerns about plaintiff Scott's renewal retention and persistency rates. He discussed these concerns with Ms. Milan. In response to Mr. Cataffo's concerns, Ms. Milan advised him that due to the numerous policy violations in which plaintiffs had engaged, they needed to be removed from their positions. Mr. Cataffo's concerns regarding renewal and persistency rates did not need to be addressed by Ms. Milan because she was focused on the policy violations.

On October 15, 2003, Mr. Hancock, Mr. Cataffo, and Ms. Milan met with plaintiffs to do an inventory, and plaintiffs could not account for missing documents. Mr. Hancock, Mr. Cataffo, and Ms. Milan went through documents regarding administrative issues with plaintiffs, and pointed out the violations of company policy. They then advised plaintiffs that they were being demoted to licensed agents. Plaintiff Scott told them that she felt that men had done the same things, but that they had not been demoted.

Mr. Hancock, Mr. Cataffo, and Ms. Milan advised plaintiffs that they could get their jobs back in six weeks if they met certain conditions. Plaintiff Scott requested something in writing, and they told her they would provide it the following Monday. Neither plaintiff ever received anything in writing. Libbie Kurtz, defendant's Field Employee Relations Manager, decided not to give plaintiffs the contract outlining what they needed to do because plaintiffs' attorney instructed defendant to have no further communication with plaintiffs.

Ms. Milan made the final decision regarding demotion of plaintiffs. Plaintiffs were given several reasons for their demotions. Mr. Cataffo told plaintiff Scott that she was being demoted for missing conference calls, failing to participate in a "Steak and Beans" dinner, sending packages late, and having a variance. Mr. Cataffo cannot remember all of the reasons he gave plaintiff Sweet for her demotion, but they involved field training, "Pal Awards," improper packages, personal checks, and high cancellation rates. Plaintiff Sweet claims that when she was demoted, she was not told it was for excessive cancellations. Ms. Kurtz understood the reasons as continued late packages; personal checks from plaintiff Sweet; missing packages; missing documents; refusal to attend meetings as directed; and refusal to attend and participate in conference calls as directed.

Mr. Cataffo, Mr. Hancock, and Ms. Milan left Salina with the understanding that plaintiffs were going to consider the situation. Almost immediately thereafter, plaintiffs hired an attorney, and Mr. Cataffo and Mr. Hancock were instructed by plaintiffs' counsel to not communicate with them after that.

F. Post-Demotion Offer

In January or February 2004, while plaintiffs were still agents in 7E, Mr. Cataffo called Mr. Hallbauer, the DM to whom plaintiffs were reporting, and advised Mr. Hallbauer that if plaintiffs could write a winner score, field train one person to a PAL award, and field recruit one person, then they could be promoted to the position of SM immediately. Plaintiffs had accomplished all three requirements in the past. The proposal would have put plaintiff Sweet back into the position from which she had been demoted. While the proposal would not have returned plaintiff Scott immediately back into the DM position, Mr. Cataffo told Mr. Hallbauer that "if she would do this, then, he would talk to her from there. . . ."

Following the phone call from Mr. Cataffo, Mr. Hallbauer arranged to have lunch with plaintiffs. At

the luncheon, he extended Mr. Cataffo's offer. Plaintiffs did not consider the offer to be legitimate because (1) they did not feel that Mr. Hallbauer had the authority to extend the offer, and (2) several people had told them they would never be able to return to their positions. They rejected the offer and transferred to defendant's Life/Health Division in March 2004. When plaintiff Scott transferred to Life/Health Division, she was a branch manager. However, she had no agents, no renewal documents, and any income was based strictly on her own sales; branch managers did not receive any override from any sales managers.

G. Plaintiffs' Complaints of Discriminatory Treatment

Ms. Kurtz provides support on employer relations issues for managers and the sales force, and directs investigations into discrimination and harassment complaints. She also trains employees on discrimination and harassment policies. Prior to plaintiffs' demotions on October 15, 2003, Ms. Kurtz had never received a complaint from either plaintiff.

On November 10, 2003, plaintiffs contacted Ms. Kurtz, who spoke with plaintiffs for over an hour. Plaintiff Scott complained that her demotion was unfair and unexpected, and that Mr. Hancock had been treating her unfairly for some time. Plaintiff Sweet echoed plaintiff Scott's comments regarding Mr. Hancock's unfairness. During that conversation, Ms. Kurtz assured plaintiffs that she would initiate an investigation and asked them if they would provide more detail and some additional information to assist in the investigation. Plaintiffs responded that they would have to check with their attorney first.

At the time they complained to Ms. Kurtz, plaintiffs made no mention of any adverse action taken against them because of their gender; nor did they make any allegations of harassment or hostile work environment. On November 11, 2003, Ms. Kurtz initiated an investigation, which included making telephone calls, conducting interviews, and gathering documentation. During Ms. Kurtz's investigation, her

contact with plaintiffs' managers was "virtually constant." To further investigate plaintiffs' allegations, Ms. Kurtz sought the assistance of the sales service office manager, Carl Barsanti. Mr. Barsanti conducted an investigation of all DMs, based on the documents received from the district and the packages received, to determine whether any allegations made by plaintiffs were true.

During his investigation, Mr. Barsanti found that plaintiff Scott had submitted "phony man weeks," or assigned money that she had earned to one of her agents who had not actually earned enough money that week to be on the report – in other words, listed agents on her report who had not actually worked that week. According to plaintiff Scott, Mr. Cataffo and/or Mr. Hancock requested that she do so because the number of man weeks affected their bonuses. Plaintiff Scott actually complained about the fact that phony man weeks were being made, and, on at least one occasion, refused to put people on her report who were not working. After her demotion, plaintiff Scott specifically complained to Ms. Kurtz about the phony man weeks.

As a result of the investigation, Ms. Kurtz learned that some violations occasionally showed up with regard to other male managers. But Ms. Kurtz concluded that to the extent that other DMs were found to have committed infractions, plaintiffs were found to have had numerous infractions of varying kinds, far in excess of what the investigation determined other DMs had committed.

III. STANDARDS FOR JUDGMENT

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)

(citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.* at 670-71. In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Id.* at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256; *see Adler*, 144 F.3d at 671 n.1 (concerning shifting burdens on summary judgment). The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256. Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler*, 144 F.3d at 671. "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.*

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut"; rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

IV. DISCUSSION

A. Hostile Work Environment Claims - Exhaustion

Defendant first argues that plaintiffs failed to administratively exhaust the hostile work environment claims contained in Counts I and II of their complaint, requiring dismissal of those claims. The court agrees.

Before bringing a Title VII or KAAD action, a plaintiff must exhaust his or her administrative remedies. *See Aramburu v. Boeing Co.*, 112 F.3d 1398, 1409 (10th Cir. 1997) (citing *Jones v. Runyon*, 91 F.3d 1398, 1409 (10th Cir. 1996)). Specifically, a plaintiff must file an administrative charge with the Equal Employment Opportunity Commission ("EEOC"). The purpose of this prerequisite is to ensure that employers have notice of the charges and to provide employers with an opportunity to voluntarily alter any illegal behavior. *See Aguirre v. McCaw RCC Commc'ns, Inc.*, 923 F. Supp. 1431, 1433 (D. Kan. 1996). After a plaintiff has complied with this administrative requirement, he or she may file suit. "The suit may include allegations of discrimination reasonably related to the allegations listed in the administrative charge, including new acts occurring during the pendency of the administrative charge." *Aramburu*, 112 F.3d at 1411 (citing *Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 864 F.2d 680, 682 (10th Cir. 1988)). But courts will disregard allegations not "reasonably related" to the listed allegations; to allow consideration "'would circumvent the administrative agency's investigatory and conciliatory role as well as deprive the charged party [of] notice of the charge.'" *Smith v. Bd. of Pub. Utils.*, 38 F. Supp. 2d 1272, 1284 (D. Kan. 1999) (quoting *Harrell v. Spangler, Inc.*, 957 F. Supp. 1215, 1219 (D. Kan. 1997)) (internal quotation marks and citation omitted). "[B]ecause failure to exhaust administrative remedies is a bar to subject matter jurisdiction, the burden is on the plaintiff as the party seeking federal jurisdiction to show by competent evidence that she did exhaust." *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1106

(10th Cir. 2002).

Plaintiffs filed their Charges of Discrimination with the EEOC on January 2, 2004. In their charges, both plaintiffs alleged discrimination on the basis of sex and retaliation. Specifically, plaintiffs alleged that during their employment, they were ". . . subjected to disparate treatment. . . ." Nowhere in their charges do plaintiffs reference either sexual harassment or hostile work environment. But later, in unsigned and unverified supplemental information sheets that plaintiffs provided to the EEOC, plaintiffs did reference issues that could be construed as complaints of a hostile work environment. Plaintiffs argue that they properly exhausted their administrative remedies for two reasons: (1) because the supplemental information should be considered part of their charges for exhaustion purposes, and (2) because defendant was aware that they were making hostile work environment claims.

The court finds that the unsigned and unverified supplemental information sheets should not be considered part of plaintiffs' EEOC charges for purposes of exhaustion. Despite having legal counsel before and during the administrative process, plaintiffs never amended their charges to include a separate allegation of hostile work environment based on sexual harassment. And, as noted, the supplemental information sheets, which plaintiffs submitted to the EEOC based on questionnaires presented by the case investigator, were neither signed nor sworn. Based on these circumstances, the court concludes that plaintiffs failed to administratively exhaust their hostile work environment claims. *See McCall v. Bd. of Commr's of County of Shawnee, Kan.*, 291 F. Supp. 2d 1216, 1222-23 (D. Kan. 2003) (holding that submission of an unverified intake questionnaire did not constitute exhaustion of remedies) (citing *Pijnenburg v. W. Ga. Health Sys., Inc.*, 255 F.3d 1304, 1306-07 (11th Cir. 2001) (holding that an intake questionnaire does not constitute a valid EEOC charge); *Lawrence v. Cooper Cmties., Inc.*, 132 F.3d

447, 449 (8th Cir. 1998) (holding that a signed, unverified Charge Information Form with additional handwritten pages was not a charge); *Park v. Howard Univ.*, 71 F.3d 904, 908-09 (D.C. Cir. 1995) (holding that an intake questionnaire was not the same as an EEOC charge); *Michelson v. Exxon Research & Eng'g Co.*, 808 F.2d 1005, 1009-10 (3d Cir. 1987) (holding that records made by the EEOC based upon a telephone conversation with the plaintiff did not constitute an EEOC charge); *Williams v. Prison Health Servs., Inc.*, 159 F. Supp. 2d 1301, 1312-13 (D. Kan. 2001) (holding that a KHRC intake form did not qualify as a proper charge for purposes of exhaustion of administrative remedies requirement)). The cases that plaintiffs cite do not require a different result. *See, e.g.*, *Park*, 71 F.3d at 907; *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 503 (7th Cir. 1994) ("[O]rdinarily, a claim of sexual harassment cannot be reasonably inferred from allegations in an EEOC charge of sexual discrimination."); *Guliford v. Beech Aircraft Corp.*, 768 F. Supp. 313, 316 (D. Kan. 1991) ("'[T]he critical question is whether the claims set forth in the civil complaint come within the 'scope of the EEOC investigation' which can reasonably be expected to grow out of the charge of discrimination."' (citations omitted)). Plaintiffs' complaints of disparate treatment and retaliation are not reasonably related to their complaints of hostile work environment. *See Pritchett v. W. Res., Inc.*, 313 F. Supp. 2d 1120, 1127 (D. Kan. 2004).

The court also rejects plaintiffs' argument that they exhausted their administrative remedies because a member of defendant's Human Resources Department knew that they were advancing a hostile work environment theory. Plaintiffs cite no authority to support their contention, and the court finds none. Accepting such a theory would essentially eliminate Title VII's exhaustion requirements.

For these reasons, the court dismisses plaintiffs' hostile work environment claims.

B. Disparate Treatment Claims

To determine whether plaintiffs can survive summary judgment on their disparate treatment claims (also included in Counts I and II of the complaint), the court applies the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Under *McDonnell Douglas*, plaintiffs must first establish a prima facie case of gender discrimination. To establish a prima facie case of disparate treatment, plaintiffs must show that (1) they belong to a protected class; (2) they suffered an adverse employment action; and (3) defendant treated similarly situated employees differently. *Trujillo v. Univ. of Colo. Health Scis. Ctr.*, 157 F.3d 1211, 1215 (10th Cir. 1998) (citations omitted). If plaintiffs carry that burden, defendant must then articulate a facially nondiscriminatory reason for the challenged employment action. *Id.* (citations omitted). If defendant makes such a showing, the burden reverts to plaintiffs to prove the proffered nondiscriminatory reason is pretextual. *Id.* (citations omitted). To establish pretext, plaintiffs must show either that "a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Plaintiffs may accomplish this by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence." *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (quoting *Olson v. Gen. Elec. Astrospace*, 101 F.3d 947, 951-52 (3d Cir. 1996)). Plaintiffs' "mere conjecture that [their] employer's explanation is a pretext for intentional discrimination," however, "is an insufficient basis for denial of summary judgment." *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988).

Defendant claims that plaintiffs cannot establish a prima facie case of disparate treatment because

they cannot show that similarly situated employees were treated differently. Defendant concedes for purposes of summary judgment that certain individuals may have missed more meetings than plaintiff Scott or had as many late packages, but contends that no single male violated as many company policies as often as plaintiffs did.

Construing the record in the light most favorable to plaintiffs, the court concludes that plaintiffs have established a genuine issue of material fact as to whether defendant treated them differently than male employees. At a minimum, plaintiffs have presented evidence suggesting that Mr. Gumescheimer sent in personal checks, mailed packages late, reported phony man weeks, and had at least two variances, but was not demoted.[2] Plaintiffs have offered evidence that male employees engaged in the activities for which plaintiffs were demoted – but the male employees were not demoted, or at least not until after being given a period of time in which to make corrections. Plaintiffs have submitted a prima facie case of disparate treatment.

Defendant has offered a legitimate, nondiscriminatory reason for plaintiffs' demotions, which means that the burden reverts to plaintiffs to offer evidence of pretext. Again, the court finds that plaintiffs have met this burden. Plaintiffs have offered evidence suggesting that defendant's enforcement of its policies is sporadic and that plaintiffs' supervisors may have even encouraged policy violation. And despite the fact that Ms. Milan made the final decision to demote plaintiffs, she made it based on facts that were brought to her attention by Mr. Cataffo and Mr. Hancock. Viewing the facts in the light most favorable to plaintiffs, Mr. Cataffo and Mr. Hancock may have selectively called policy violations to Ms. Milan's attention. The

[2] The record contains conflicting evidence as to when and if Mr. Gumescheimer was demoted. The court resolves the discrepancy in favor of plaintiffs.

court finds that plaintiffs have presented sufficient evidence of pretext to submit their claim to the jury.

For the above-stated reasons, the court denies summary judgment regarding plaintiffs' disparate treatment claims.

C. Retaliation Claims

In Count III of their complaint, plaintiffs claim that defendant retaliated against them because they complained of gender discrimination. Specifically, plaintiffs claim that defendant retaliated against them by demoting them and by failing to restore them to their prior positions after six weeks. The same burden-shifting approach described above applies to plaintiffs' retaliation claims.

The court first considers plaintiffs' claims that they were demoted in retaliation for complaining of discrimination. The uncontroverted facts show that plaintiffs did not lodge any complaints against Mr. Cataffo or Mr. Hancock until after they were demoted on October 15, 2003.[3] Even though plaintiffs claim that they complained of discrimination "at the time" they were demoted, neither plaintiff takes this claim a step further and alleges that she complained **before** she received the news that she was being demoted.[4] And the next time plaintiffs complained to Ms. Kurtz was November 10, 2003 – well after their demotion.

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[3] Plaintiff Scott testified in her deposition that she had a conversation with Tom Schmidt, a Vice-President of defendant, prior to her demotion, and she had told him that they were treating her differently than the men. The only information the court has about when this conversation occurred is that it was "after they gave [her] the Great Bend area and then took it back." Plaintiff also has presented no evidence that Mr. Schmidt was a decision-maker with respect to her demotion or continued demotion. She also testified in deposition that she reported some vulgar comments that Jack Gardner made to Mr. Cataffo and Mr. Hancock, but again does not specify when this happened. This evidence is insufficient to create a genuine issue of material fact as to whether the company was on notice of plaintiffs' complaints before their demotion.

[4] The court has reviewed plaintiff Scott's deposition testimony on this claim, which reveals that she did not complain that men had done the same thing without being disciplined until **after** Mr. Cataffo told her they had made the decision to demote her.

For plaintiffs to establish a prima facie case of retaliation, they most show that: (1) they engaged in protected opposition to discrimination; (2) they were subjected to an adverse employment action subsequent to or contemporaneous with their protected activity; and (3) a causal connection existed between the protected opposition and the adverse employment action. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 985 (10th Cir. 1996); *Jones v. Rent-A-Center Inc.*, 240 F. Supp. 2d 1167, 1175 (D. Kan. 2002). Plaintiffs fail to meet the second element. Plaintiffs' theory that their initial demotion was in retaliation for their complaints of discrimination will not be submitted to the jury.

Additionally, plaintiffs advance a "continuing demotion" theory – essentially, they claim that because they complained of discrimination after being demoted, defendant failed to return them to their former positions. The issue with this claim is whether plaintiffs' "continued demotion" constitutes an adverse employment action.[5] The court finds, under these particular facts, it may have.[6]

The Tenth Circuit takes a case-by-case approach in considering whether certain actions constitute adverse employment actions. *See Trujillo v. N.M. Dep't of Corrs.*, No. 98-2143, 1999 WL 194151, at *2 (10th Cir. Apr. 8, 1999). Generally, conduct qualifies as an adverse employment action if it "constitutes a significant change in [the plaintiff's] employment status." *Hertenstein v. Kimberly Home Health Care, Inc.*, 58 F. Supp. 2d 1250, 1260 (D. Kan. 1999). Here, viewing the evidence in the light most favorable to plaintiffs, defendant told them that they could have their jobs back in six weeks if they met certain conditions. But defendant never outlined those conditions for plaintiffs, and defendant failed to return them

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[5] The court finds that plaintiffs have offered sufficient evidence to create a triable issue for a jury on the other two elements of a prima facie case.

[6] The court has doubts whether such a cause of action generally will be cognizable. The circumstances in this case are unique, however, and the court finds that it is appropriate to recognize it here.

to their positions in six weeks. The court views this as akin to failure to promote, and finds that such actions may constitute an adverse employment action.

Defendant argues that plaintiffs suffered no adverse employment action because Mr. Cataffo, through Mr. Hallbauer, offered to restore plaintiffs to the SM position three months after their demotion. Had plaintiff Sweet accepted this offer, her "continued demotion" would have ceased. Had plaintiff Scott accepted the position, she would have been in a position one step down from her previous job. According to defendant, the fact that plaintiffs did not consider the offer to be a legitimate, good faith offer does not controvert the fact that defendant made the offer.

Although defendant's position may have some merit, the court believes that this issue is one for the jury. The court finds that plaintiffs have submitted evidence sufficient to make a prima facie case of retaliation. Defendant has offered good faith reasons for not restoring plaintiffs to their original positions, which means that plaintiffs must show that defendant's reasons are pretextual. Plaintiffs have met this burden for the reasons previously stated. The court denies summary judgment on this claim.

D. Whistleblower Claims

Plaintiffs' final claims in Count IV of their complaint are that defendant demoted them and "continued demoting" them in violation of Kansas common law. Kansas courts will not entertain a common law whistleblower claim as an exception to the at-will employment doctrine where a state or federal statute provides an adequate, alternative remedy to the common law cause of action. *Bunker v. City of Olathe*, 2001 WL 230364, at *2-*3 (D. Kan. Feb. 21, 2001) (citing *Flenker v. Willamette Indus., Inc.*, 967 P.2d 295, 299 (Kan. 1998)). Plaintiffs have already asserted a state and federal remedy for retaliatory demotion and "continued demotion" under Title VII and the KAAD. Plaintiffs' whistleblower claims

therefore are duplicative of Count III of their complaint, and summary judgment in favor of defendant on this claim is appropriate.

Plaintiffs suggest that the court should consider their whistleblower claims distinct from their retaliation claims, by considering whether defendant demoted them because they refused to turn in "phony man weeks" and reported that others did. The court questions whether plaintiffs preserved this claim in the pretrial order. "A plaintiff cannot escape the binding effect of the pretrial order by raising new issues in a response to the defendant's motion for summary judgment." *Hullman v. Bd. of Trustees*, 732 F. Supp. 91, 93 (D. Kan. 1990) (citing *Bieber v. Associated Collection Servs., Inc.*, 631 F. Supp. 1410, 1414 (D. Kan. 1986)). Even if the pretrial order can be construed to contain this theory, however, the court finds that it lacks merit.

Plaintiffs have offered no authority suggesting that the phony man weeks constitute a violation of rules, regulations or law pertaining to public health, welfare, safety, or general welfare. Plaintiffs argue that "the health insurance industry is highly regulated," but they point to no regulation that defendant has violated. Instead, plaintiffs argue that, as a matter of policy, the act of reporting phony man weeks "weaken[s] the integrity in the public health system as a whole and create[s] further suspicion into the true viability of the products [d]efendant markets."

Plaintiff Scott allegedly complained about not wanting to report individuals on her weekly report whom she felt were not in the field generating revenue (although she admittedly submitted such reports). But plaintiff Scott did not complain that she felt defendant was violating a particular law or regulation. At most, plaintiffs may have identified a practice that affects the interest of the employer – a strictly private interest – and no one else. *See e.g., Fox v. MCI Commc'ns Corp.*, 931 P.2d 857 (Utah 1997) (finding

no public policy claim stated where employee made internal reports only, and where conduct complained of – while dishonest – did not injure employer's customers)*; Garrity v. Overland Sheepskin Co.*, 917 P.2d 1382 (N.M. 1996) (holding that employee could not state a cause of action for retaliatory discharge because employee's internal whistleblowing of store manager's illegal activities was not for the public benefit but was for private benefit of employer); *Hayes v. Eateries, Inc.*, 905 P.2d 778 (Okla. 1995) (holding that employee's termination for either internal or external reporting of crime by co-employee which affects employer only, such as embezzlement, does not form adequate basis for public policy claim).

For these reasons, the court grants summary judgment as to plaintiffs' whistleblower claims.

IT IS THEREFORE ORDERED that defendant's Motion for Summary Judgment (Doc. 59) is granted in part and denied in part.

Dated this 20th day of March 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge